No. 83-2161

In The
Supreme Court of the United States
October Term, 1984

STATE OF MONTANA, et al.,
Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Response to Petitioner's Statement

Montana's brief makes two assertions that are misleading and may imply allegations of fact that are incorrect and unsupported by the record. Both relate to a point of confusion that has to some extent permeated this case from its inception. The Blackfeet Tribe has not challenged Montana's taxation of non-Indian oil and gas producers operating leases on tribal lands. The challenge is solely to taxes on the tribal royalty share of production, typically a one-eighth share. The State's Statement of the Case alleges, "Until 1977, the State collected taxes on all oil and gas production in the State of Montana, including production from Blackfeet leases." Mont. Br. 9. The claim is repeated in the State's argument. *Id.* at 26. If the State merely means that it has taxed non-Indian oil and gas producers operating on Blackfeet lands, the claim may be true (although we doubt that Montana is so efficient as to collect taxes on "all" production). If the State means to imply that it taxed "all" tribal royalties before 1977, the statement is incorrect and is not supported by the record, as discussed below.

The State's second allegation says that the Interior Department "assisted the State in collecting its taxes on all leases for a period of more than 40 years." Mont. Br. 19. This assertion is repeated at Mont. Br. 28 and 30. Again, if this means taxes on the non-Indian producer's share, it might be true but is not what is at issue in this case. But if this is a clever way to say that Interior consistently assisted in collecting taxes on the tribal royalty share from post-1938 leases for 40 years, it is not correct and is not supported by the record.

It is notable that Montana cites nothing in the record to support these assertions. What the trial record has is a 1977 Bureau of Indian Affairs Special report showing that taxes were deducted from tribal royalties by some (but not all) lessees between the years 1955 and the date of the report. R. vol. II doc. no. 52 (exh. C).

The trial record also has affidavits of state officials that conflict with the claims Montana is making to this Court. There is a separate affidavit for each Montana tax at issue with an attached form used to report the tax. R. vol. II doc. no. 65 (exh. 2-6 and attached forms). Several of these affidavits assert that it is impossible from State records to determine whether *any* tax has been paid on tribal royalties. *Id.* (exh. 2 ¶10, 3 ¶10, 4 ¶17, 5 ¶18, 6 ¶7-15). Two of them state specific instances when taxes were not paid on tribal royalties. *Id.* (exh. 4 ¶16, 5 ¶16). Only one of them, respecting a minor tax, recites knowledge of instances when taxes were paid on tribal royalties. *Id.* (exh. 5 ¶17).

In the Court of Appeals, the Tribe added to the record copies of several formal and informal Interior Department opinions that are reprinted in the State's Appendix to its Petition, pages 232-321. As we discuss fully in our argument (at 23-24), the earliest mention in any of these opinions of the 1938 act or of leases made under it is in an informal and unpublished opinion of the Associate Solicitor for Indian Affairs made in 1956. The record is silent prior to that date. The State can claim some indirect, low level administrative support for its position for the period from 1956 to 1977. But the record plainly does not support the State's shotgun claim of a consistent administrative practice for 40 years. In fact, an earlier

opinion made in 1954, addressing taxes under pre-1983 leases, seems to say that taxes had not been regularly paid for several years. Pet. App. 254.

In sum, the record is silent on tax collections or administrative practice respecting 1938 act leases prior to 1955 or 1956, long after the 1938 act was passed. From 1955 to 1977, the record shows some royalty taxes paid and some low-level administrative opinion favoring the State. In 1977, Interior made its first careful review of the issue presented here and ruled against the State. 84 Interior Dec. 905 (1977). It has consistently followed this ruling, as shown by the brief of the United States in this Court.

Facts

The Blackfeet Tribe of Indians resides on an isolated reservation in northwestern Montana. The reservation is bordered on the west by Glacier National Park and on the north by the Canadian border.[1] The reservation economy is severely limited by its isolated location and available resources. Since 1932, the Blackfeet Tribe has been developing its oil and gas resources as one of the few means available to achieve economic independence.

Montana levies four separate taxes on the Blackfeet Tribe's royalty interests from oil and gas production on

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[1]The Blackfeet Reservation was originally reserved to the Tribe by Treaty of October 17, 1855, 11 Stat. 657. It was subsequently reduced to its present size by a series of executive orders and cessions. *See* British-American Oil Producing Co. v. Board of Equalization of the State of Montana, 299 U.S. 159, 162-63 (1936); 84 Int. Dec. 905,912 (1977) (Pet. App. 267, 292-295).

the Reservation.[2] This case was initiated by the Blackfeet Tribe in 1978 because it believed that Montana was invalidly taxing tribal property and thereby inhibiting tribal economic independence.[3] At the time, the Tribe was the lessor in 125 oil and gas leases, twelve made prior to 1938 and the remainder made after 1938.

The pre-1938 leases were made under authority of the Act of February 28, 1891,[4] as amended by the Act of May 29, 1924.[5] The 1891 act authorized the leasing of lands "occupied by Indians who have bought and paid for the same." Prior to 1938 it was the primary authority for leasing unallotted lands on treaty reservations for oil and

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[2]The four taxes are:

1. Oil and Gas Severance Tax, 15-36-101 et seq. M.C.A. (1983) (Pet. App. 195);
2. Oil and Gas Net Proceeds Tax, 15-23-601 et seq. M.C.A. (1983), formerly 84-7201 et seq., R.C.M. (1947) (Pet. App. 181);
3. Oil and Gas Conservation Tax, 82-11-131, M.C.A. (1983), formerly 60-145, R.C.M. (1947) (Pet. App. 215);
4. Resources Indemnity Trust Tax, 15-38-104 et seq. M.C.A. (1983), formerly 84-7006, R.C.M. (1947) (Pet. App. 206).

The tribe also challenged in its amended complaint the Producer's License Tax, 84-2202 R.C.M. (1947) (Pet. App. 222). This section was repealed and replaced by the Oil and Gas Severance Tax. It is principally relevant to the Tribe's claim for a refund of past tax payments, which was not addressed in the courts below.

[3]The combined taxes take about 18% of gross oil production in Glacier County and about 17% in Pondera County, varying with the local tax rate. *See* Montana Taxation—1984 (Mont. Tax Found.). By contrast, the Tribe's royalty is usually 12.5%.

[4]26 Stat. 795, codified at 25 U.S.C. 397 (Pet. App. 150-151).

[5]43 Stat. 244, codified at 25 U.S.C. 398 (Pet. App. 152-154).

gas purposes. The 1924 act amended the 1891 act to allow the extension of the term of oil and gas leases to "as long as oil and gas be found in paying quantities," and to authorize state taxation of production "on such lands" in the same manner as production on unrestricted lands.

In 1938, Congress enacted a comprehensive Indian mineral leasing statute designed to achieve uniformity in the leasing of Indian lands for mining purposes, harmonize with the Indian Reorganization Act, and increase the economic return to the Indians.[6] The majority of the leases in question were made under this statute.

Proceedings Below

The district court held that the 1924 act authorized the state taxes, in an opinion dated January 6, 1981, which granted summary judgment to petitioners. 507 F.Supp. 446 (D. Mont. 1981), Pet. App. 103.[7] On appeal, the Ninth Circuit Court of Appeals affirmed the district court. 729 F.2d 1185 (9th Cir. 1982), Pet. App. 70. The Tribe petitioned for rehearing *en banc*, which was granted. 709 F.2d 521 (9th Cir. 1982).

The *en banc* decision affirmed the district court's holding that the 1938 act did not repeal the 1924 act tax authorization for leases made prior to 1938. But for

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[6]Act of May 11, 1938, 52 Stat. 347, codified at 25 U.S.C. 396a-396g (Pet. App. 175-180).

[7]Montana also defended its taxes on the ground that the sole legal incidence of the taxes is on the non-Indian producers so that the Tribe is not taxed. The district court did not rule on this issue.

leases after 1938, the court held that the 1924 act tax authorization does not apply. 729 F.2d 1192 (9th Cir. 1984), Pet. App. 1. The court remanded the case to the district court to determine the legal incidence of the tax. If the incidence of the tax is found to be on the producer, the Ninth Circuit further directed the district court to decide whether Montana's taxes are preemepted under the standards of *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390 (9th Cir. 1982), *cert. denied*, 459 U.S. 916 (1982). The State then obtained review by this Court.

SUMMARY OF ARGUMENT

Since 1938, Blackfeet oil and gas leases have been executed under the 1938 Indian Mineral Leasing Act. No provision of the 1938 act expressly or implicitly authorizes state taxation of these leases.

The 1924 act tax consent is a provisio to an amendment to the 1891 leasing act. By its plain terms, the consent applies only to leases made under the 1891 act as amended. Therefore, no issue of repeal of the 1924 tax consent is raised. Even if repeal is considered, it is clear from the 1938 act and its legislative history that the 1938 act was intended as a prospective replacement for prior leasing laws. Nothing in the 1938 act incorporates preexisting statutory provisions, even though prior laws continue to govern existing leases.

State taxation of tribal royalties is inconsistent with the three major purposes of the 1938 act. The act was

intended to bring leasing into harmony with the policies of the Indian Reorganization Act (IRA). Exemption of Indian lands from state taxation was an express policy of the IRA, which also established the means to give tribes greater control over reservation resource development. Both the IRA and the 1938 act were also meant to promote economic independence for tribes by insuring the greatest return from tribal property. Lastly, the 1938 act was intended to bring uniformity to the area of Indian mineral leasing. Application of the 1924 tax consent would thwart each of these purposes of the 1938 act.

In a decision published in 1977, the Department of the Interior concluded that 1938 act leases are not subject to the 1924 tax consent. This is the only administrative decision to address the specific issue before the Court, and it directly supports the Tribe's position. The State's claims that royalty taxes were consistently paid and supported by the Interior Department prior to 1977 are incorrect and are not supported by the record.

State taxation of Indian poperty is a major departure from normal policies against taxing the property of tribes on self-governing reservations. The 1924 tax consent, made at a time when federal policy contemplated that reservations would cease to exist, should not be extended by doubtful and ambiguous construction to the 1938 act, passed after Congress had reaffirmed the policy of reservation self-government.

ARGUMENT

The 1924 Tax Consent Proviso Does Not Apply to Leases Made Under the 1938 Mineral Leasing Act

A. The Wording of the Proviso Plainly Applies Only to Lands Leased Under the 1891 Leasing Act, as Amended in 1924.

The tax proviso found in the 1924 amendment to the 1891 act consents to state taxation of production only "on such lands." 25 U.S.C. 398. "Such lands" in the proviso refers to the main part of the 1924 statute, the subject of which is "unallotted land on Indian reservations . . . subject to lease for mining purposes . . . under . . . the Act of February 28, 1891 . . . ." Thus "on such lands" refers to lands that are leased under the 1891 act. These are the only lands mentioned at all in the statute, and the only lands to which the tax consent can apply. Generally, a proviso like the tax consent in the 1924 act, refers only to the provision to which it is attached; it is not an independent law. *United States v. McClure*, 305 U.S. 472, 477-78 (1939); *United States v. Morrow*, 266 U.S. 531, 535 (1924).

The plain meaning of the 1924 tax consent presents a straight-forward issue of statutory construction. It does not raise any question of repeal. This construction leaves the 1891/1924 act in force for leases that were made under it. There is no occasion to resort to the rules governing repeals by implication. As the Court said in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982):

> As in all cases involving statutory construction, "our starting point must be the language employed by Congress," Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962). Thus "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The literal meaning of the statute is supported by several factors. First, the 1924 act is an amendment to the 1891 act. It includes new terms and conditions under which lands can be leased under the 1891 act. It is not a separate leasing authority, and it does not refer to any other acts under which lands could be leased.

Second, Congress in 1927 enacted a separate tax consent provision in connection with the leasing of Executive Order reservation lands for oil and gas mining purposes.[8] Section 3 of the 1927 act, 25 U.S.C. 398c, authorized state taxation of oil and gas production including tribal royalties "in the same manner as such taxes are otherwise levied and collected." If the 1924 act tax consent applied to lands other than those leased under the 1891/1924 act, the separate tax consent in the 1927 act would have been redundant.

Third, the plain meaning of the statute is also supported by the fact that the 1938 act is a separate and independent source of authority for the leasing of Indian lands for mining purposes. It applies to leases entered

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[8]Act of March 3, 1927, 44 Stat. 1347, codified at 25 U.S.C. 398a-398e.

into "hereafter," that is, after May 11, 1938.[9] In fact, all Indian leases made after 1938 (until 1982)[10], specifically have been executed only under the 1938 act, and federal regulations governing oil and gas leasing since 1938 have recited only the 1938 act as authority for the regulations. *See* Part C *infra*. The 1938 act does not specifically carry forward or incorporate any prior laws, nor has it been interpreted administratively as doing so.

Montana's argument that the 1924 tax consent applies to leases made after 1938 depends on the idea that the tax consent is ambulatory, or that the 1938 act implicitly incorporates the tax consent despite the lack of any language to that effect. However, the plain meaning of the 1924 tax consent, together with the autonomous nature of the 1938 act, support just the opposite interpretation—that the 1924 tax consent applies only to leases made under the 1891 act.

B. State Taxation of Tribal Royalties Is Inconsistent with the History and Purposes of the 1938 Act.

States are prohibited from taxing tribal property unless Congress expressly consents. *Bryan v. Itasca County*,

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[9]Montana does not dispute that the 1938 act is a separate leasing authority, but argues that the 1924 tax consent does not conflict or is not inconsistent with this separate leasing statute and therefore applies even to 1938 act leases. This reasoning twists the rule against repeals by implication into a "rule" that a priviso in one law is presumed to apply to another, separate law unless it is wholly inconsistent with it. No such "rule" has ever been applied by any court.

[10]In 1982 Congress passed another, broader Indian Mineral Leasing Act, 96 Stat. 1938, codified at 25 U.S.C. 2101-2108. Like the 1938 act, the 1982 act does not consent to state taxation. Nevertheless, in its petition for certiorari, the State seemed to claim the right to tax tribal leases under the 1982 act. Pet. 41.

426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). There is nothing in the 1938 act or its legislative history that mentions taxation or rises to the level of express Congressional consent to taxation. Indeed, the very purposes of the 1938 act would be undercut by the imposition of state taxes on tribal royalties.

There were three major purposes of the 1938 act. The first was "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. 1 (1938). The second purpose was to "bring all mineral leasing matters in harmony with the Indian Reorganization Act [Act of June 18, 1934, 25 U.S.C. 461 et seq.]". S. Rep. No. 985 at 3; H.R. Rep. No. 1872 at 3. The third purpose was to insure that the Indians receive the "greatest return from their property." S. Rep. No. 985 at 2; H.R. Rep. No. 1872 at 2. State taxation of tribal royalties conflicts with each of these purposes.

Prior to the passage of the 1938 act, mineral leasing on tribal lands was authorized by a number of different statutes, or in some situations by none at all. Separate statutes authorized leasing of tribal lands on treaty and statutory reservations that had been "bought and paid for" (1891/1924 act), and on Executive Order reservation lands.[11] A 1919 Act of Congress authorized leases of un-

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[11]Act of Mar. 3, 1927, 44 Stat. 1347, codified at 25 U.S.C. 398a-398e.

allotted lands on Indian reservations in nine states for mining except for oil and gas.[12] Tribal lands of certain tribes were subject to special leasing statutes.[13] Tribal lands set aside by statute that had not been "bought and paid for" were not covered by any of the leasing authorities except for those within the nine named states in the 1919 act, which omitted oil and gas.[14] The status of off-reservation tribal lands was uncertain. As a result, the entire area of mineral leasing of tribal land was confusing, overlapping, and sometimes inadequate. The need for uniformity was clear.[15] The 1938 act authorizes leasing for mining purposes on all categories of tribal land except for those expressly excepted in Section 6 of the act. The 1938 act therefore achieved substantial uniformity for most tribal lands, including some not covered by any prior leasing authority.

State taxation also conflicts with the second major purpose of the 1938 act—to bring leasing into harmony with the Indian Reorganization Act. This purpose appears on the face of the 1938 statute in the proviso to Section 2 and in its legislative history. *See* S. Rep. No. 985, *supra*,

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[12]Act of June 30, 1919, 41 Stat. 31, codified at 25 U.S.C. 399.

[13]See e.g. discussion of the complex Osage statutes in F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), Ch. 14, Sec. B3b.

[14]For an important example of such lands, see *infra* at 14 (discussion of 25 U.S.C. 465).

[15]The 1938 act was prospective only, causing lack of uniformity between leases made before and after the act. This was presumably thought prudent to avoid difficult problems of retroactive application.

at 3; H.R. Rep. No. 1872, *supra*, at 3.[16] These specific references to the IRA in the act and its legislative history require a close examination of the purposes and policies of the IRA with which the 1938 act was intended to harmonize.[17]

The Indian Reorganization Act signalled a significant and substantial change in federal Indian policy. It marked the end of the assimilationist era and began a new era of tribal revitalization in terms of tribal government and economic development. It provided for the reorganization of tribes as constitutional governments and business corporations, and it repudiated the policy of allotment of Indian lands, which had been responsible for the loss of so much land. *See Fisher v. District Court*, 424 U.S. 382, 387 (1976) (the IRA was specifically "intended to encourage Indian tribes to revitalize their governments"); *Morton v. Mancari*, 417 U.S. 535, 542 (1974) ("The overriding purpose of that particular Act [the IRA] was to establish machinery whereby Indian tribes would be able to assume

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[16]There is an additional connection between the 1938 act and the IRA. The IRA was sponsored by Senator Wheeler and Representative Howard; it is sometimes called the Wheeler-Howard Act. The same Congressmen introduced the first bills that eventually led to the 1938 act. S. 3565, 73d Cong., 2d Sess. (1934); H.R. 9427, 73d Cong., 2d Sess. (1934). *See* 78 Cong. Rec. 7876, 8265 (1934).

[17]Petitioners argue that the IRA should not be used to assist in interpreting the 1938 act, citing Rice v. Rehner, 103 S.Ct. 3291 (1983). Mont. Br. 47-48. This ignores the specific language of the act and the legislative history, and the many cases in which this Court has looked to the IRA and its policies in striking down state regulation of Indian activities within reservations. See New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378, 2386 n.17 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 134-35 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 n.10 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 479 (1976).

a greater degree of self-government, both politically and economically").

State tax exemption was an express policy of the IRA. This is plain from § 5 of the Act, 25 U.S.C. 465, which authorizes land within or without existing reservations to be taken in trust for tribes or individual Indians. The section specifies that such land "shall be exempt from State and local taxation." *See Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 155-59 (1973). Mineral taxation is not excepted from the tax exemption. (Contrast 25 U.S.C. 501, the comparable law for Oklahoma, which expressly allows certain mineral taxes.) Thus, application of the 1924 act to 1938 leases plainly conflicts with an explicit policy of the IRA.

Lands taken in trust for a tribe under § 5 of the IRA are leaseable under the 1938 act but not under the 1891 act unless they have been "bought and paid for." Most acquisitions under § 5 have been granted to tribes by the U.S. Therefore, this is a major category of tribal land for which there was no leasing authority before 1938.

The governmental, economic, and land preservation purposes of the IRA are all directed toward increased tribal autonomy over internal affairs, the protection and development of tribal lands and natural resources, and the furtherance of economic independence. Sections 16 and 17 of the IRA provide a mechanism for tribes to reorganize or revitalize their governments. Among other things, these provisions authorize tribes to exercise greater control over their land and resources by allowing them "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands or other tribal assets without the consent of the tribe" and by allowing tribal corporations "the power to purchase . . . or otherwise, own, hold, manage, operate and dispose of real property . . . ."[18] Rather than creating harmony with the IRA, state taxation would make it even more difficult for tribes to control development on their reservations. It would be inconsistent for the 1938 act as a statute designed to give tribes full IRA authority in the area of leasing to, at the same time, diminish that authority by authorizing state jurisdiction to tax tribal property.

The importance of IRA policies in the construction of later statutes is apparent in the Court's decision in *Moe v. Confederated Salish & Kootenai Tribes, supra.* Montana attempted to impose certain taxes on Indians residing on former allotments that had been granted to the Indians in fee under a 1906 amendment to section 6 of the General Allotment Act, 25 U.S.C. 349, which specifically applied State law to allottees. 425 U.S. at 477-79. The Court held the taxes invalid based in part upon the policies of the IRA. Here both the 1938 act and its legislative history specifically refer to the IRA. Thus reference to IRA policies and purposes is not only invited but required.[19]

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[18]Sections 16 and 17 are the heart of the IRA. They are the means established by Congress for achieving greater tribal control and protection over reservation resources and economic independence. Thus sections 16 and 17 involve far more than merely requiring tribal consent to the leasing of land as Montana argues. In any case, as Montana points out, Mont. Br. 52, tribal consent was already part of the 1891/1924 act. Thus no greater harmony with the IRA would be achieved by the 1938 act if it merely added a tribal consent requirement.

[19]Petitioners misstate the importance of the IRA in interpreting the 1938 act. The IRA did not "do away with" the

(Continued on next page)

Lastly, state taxation would conflict with the purposes of both the 1938 act and the IRA to further economic independence of tribes. Imposition of a tax on the development of already scarce resources would obviously diminish the return to tribes and make the possibility of achieving economic independence even more remote. As *amici* Gulf Companies et al. point out, imposition of the full burden of state taxes on reservation mineral development, whether the burden formally falls on the tribe, the producer or both, severely impacts that development. This is most especially true in Montana, which has very high rates of mineral taxation. *See* fn 3 *supra* (17-18% of gross proceeds for oil); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 613 (1981) (30% of gross proceeds for coal). Taxes this high severely retard development.

The failure of Congress to say anything about state taxation in the 1938 act and the lack of any reference in the legislative history means that express Congressional consent to state taxation is lacking. There are several indications that taxation was intentionally absent from the statute. The tax consent provision in the 1924 act was a particularly prominent part of the statute, both in terms of the words of the statute and the importance of the issue. It was a clear departure from the norm—one of the few instances in which Congress has consented to state taxation of Indian property. It was such a unique provision that it is unlikely that Congress would not have

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1924 act tax consent. Mont. Br. 51. But in determining whether the 1938 act intended implicitly to incorporate the tax consent, it is appropriate to look to the purposes and policies of the IRA, because the 1938 act is specifically intended to harmonize with those purposes and policies.

considered it in the process of enacting a comprehensive Indian mineral leasing statute. It is also such an important issue that it is unlikely that Congress would have left to chance the taxation of leases under the 1938 act. If it intended the leases to be taxed, it would and should have said so.[20]

Congress was clearly aware of the importance of the issue. The same Congress that passed the 1938 act held hearings on the loss of revenue from tax exempt Indian allotments in Oklahoma—hearings in which taxation of oil and gas production played an important part. *Loss of Revenue—Tax Exempt Indian Lands*, Hearings on S. Res. 168 Before the Senate Committee on Indian Affairs, 75th Cong., 3d Sess. (May 6, 1938). Montana argues that these hearings support its position in this Court. Mont. Br. 36-37, 66. The opposite is true. The hearings dealt with Indian trust allotments in Oklahoma, not located on self-governing reservations, but also not taxable under the 1924 act or any other law. As the Court has recognized, many Indians in Oklahoma "have left the reservation and become assimilated into the general community." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171 (1973). The 1938 hearings detailed the extent to which Indian allottees in that state were interspersed among the general population and were receiving the same level of state services as other persons. It is absurd to think that a Con-

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[20]Montana cites several acts which contain specific tax consents. Mont. Br. 35. When Congress wanted to authorize taxation it was careful to include consent in the statute. Congress therefore would be expected to exercise at least as much care, if not more, in addressing the issue in such a comprehensive and wide-sweeping law as the 1938 act.

gress that was so carefully considering whether Oklahoma could show the need to tax mineral production from Indian allotments would authorize taxation of land on self-governing reservations without a word in the statute or legislative history.

The same contrast is shown by another statute invoked by Montana. In the Oklahoma Indian Welfare Act passed in 1936, Congress expressly consented to state taxation of mineral production on lands taken in trust under the Act. *See* 25 U.S.C. 501, cited at Mont. Br. 66. By contrast, the comparable section of the Indian Reorganization Act—applicable to the Blackfeet Reservation—exempts lands taken in trust under it from *all* state taxation. 25 U.S.C. 465.

C. The 1938 Act Was Intended as a Prospective Replacement for Other Acts Authorizing Mineral Leases on Indian Lands.

The plain meaning of the 1938 act, *see* Part A, should make the State's alleged issue of implied repeal and any reference to rules governing implied repeals immaterial. But even if these rules are considered, in context the 1938 act was a prospective replacement for prior leasing laws, not a piecemeal amendment of them. It was a comprehensive statute intended to replace almost all other acts authorizing mineral leases on tribal lands from the date of the act forward. The 1938 act covers the whole subject of tribal mineral leasing except for the tribes expressly excepted. Reference to prior leasing statutes, including the 1891/1924 act, is therefore entirely unnecessary.[21] This

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[21]The prior statutes were replaced for leases entered into after May 11, 1938, but there were many leases in existence

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conclusion is borne out by the absence of any reference to prior acts either in the Interior regulations for new leases or in the leases themselves.

The intent of Congress to replace the earlier statutes prospectively is evident from the legislative history of the 1938 act. The act was proposed by the Secretary of Interior as legislation "to govern the leasing of Indian lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess. 1 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. 1 (1938). The Secretary noted several laws under which tribal lands could be leased: the 1891/1924 act; the Act of June 30, 1919, 41 Stat. 31; and the 1927 act authorizing oil and gas leasing on Executive Order lands. These laws were considered inadequate because 1) they were incomplete in their coverage; 2) under the 1919 act, tribes had no voice in whether lands would be opened to prospecting, and neither the Department of the Interior nor the tribe involved could prevent the acquisitions of a lease once tribal land was opened for prospecting; and 3) the existing law was not adequate to give the Indians the greatest economic return. The Secretary of the Interior therefore believed that the 1938 act "would be a more satisfactory law for the leasing of Indian lands for general mining purposes." S. Rep. No. 985 *supra* at 3; H.R. Rep. No. 1872 *supra* at 3. An intent to replace prior law with the 1938 act could not have been more clearly stated.

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in 1938 which had been executed under prior statutes including the 1891/1924 act. It is unlikely that Congress would have meant to alter these leases by making the 1938 act retroactive. Therefore, the prior statutes remain effective to govern pre-1938 leases.

To make the intent even more explicit, Section 7 of the 1938 act repealed "[a]ll Act [sic] or parts of Acts inconsistent" with the 1938 act. No specific acts were directly repealed (because of the need for the prior laws to remain effective as to existing leases), but the Secretary of the Interior was quite explicit about the inadequacies of prior law, and Congress clearly intended that the 1938 act would govern future leases because it would be "a more satisfactory law" for the leasing of tribal lands for mineral purposes. Prior law would no longer be effective for new leases.

Congress' intent to replace prior law is also shown by a significant change between prior bills and the bill that became the 1938 act. In 1935, bills were introduced in the House (H.R. 7681) and Senate (S.2638) to *"amend the law* governing the leasing of unallotted Indian lands for mining purposes." (Emphasis added). *See* 79 Cong. Rec. 6102 (1935); 79 Cong. Rec. 6257 (1935). The Secretary of the Interior's letter accompanying S.2638 is similar to his 1938 letter, but the 1935 letter stated that the bill would "effect no change in the present law for leasing oil and gas lands." S. Rep. No. 614, 74th Cong., 1st Sess. 3 (1935). In contrast, the 1938 act is an act to *"regulate the leasing* of certain Indian lands for mining purposes." (Emphasis added). In the Secretary's 1938 letter, the earlier statement about no changes in the oil and gas leasing law was deleted. S. Rep. No. 985, *supra*, and H.R. Rep. No. 1872, *supra*. These changes show Congress' intent to replace prior law, not just to amend it.

Administratively, the Department of the Interior has treated the 1938 act as a replacement for prior leasing laws. Since passage of the act, leases have been made

only under the 1938 act. New regulations governing mineral leasing were adopted on May 31, 1938. 25 C.F.R. part 186 (1938). The regulations were adopted to "carry these provisions [the 1938 act] into effect." 3 Fed. Reg. 1429 (1938). Prior regulations were expressly superseded. 25 C.F.R. 186.28 (1938). The regulations clearly track the language of the 1938 act and make no reference to the 1891/1924 act or other prior laws. Similarly, no references to the 1891/1924 act have been made in any notices of sale or leases since 1938. R. vol. II, doc. No. 52 (exh. E-1, E-2, E-3). Of the Blackfeet leases at issue, none made after 1938 mentions the 1891/1924 act. R. vol. II, doc. no. 52 (exh. A). On the other hand, those Blackfeet leases made before 1938 specifically recite the 1891 act as their authority, *id.*, a point strongly relied on by this Court in *British-American Oil Producing Co. v. Board of Equalization*, *supra*, 299 U.S. 159, 164 (1936).

Where an act covers the whole subject of an earlier act and is clearly intended as a substitute, the earlier act will be deemed replaced. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 468 (1982). Here Congress' intent to substitute the 1938 act for future leasing is clear from the face of the act and the legislative history. Moreover the existence of section 7 further shows the intent of the 1938 act as a comprehensive law which replaces prior laws. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-18 (1980).

D. Federal Administrative Interpretation of the Leasing Statutes Supports the Tribe's Position.

The 1924 tax consent provision has been interpreted by the Department of the Interior on several occasions,

but no administrative opinion until 1977 specifically addressed the issue before this Court. In 1977 the Solicitor for the Department of the Interior ruled that royalties received from leases made under the 1938 act are not subject to the 1924 act tax consent. 84 Interior Dec. 905 (1977) (Pet. App. 267). The Solicitor reasoned that the failure of the 1938 act to mention taxation created an ambiguity about the applicability of the 1924 act tax consent, and that this ambiguity must be resolved against state taxation under the principles established in *Bryan v. Itasca County*, 426 U.S. 373 (1976) and other applicable case law. The 1977 opinion is the first and only opinion to address the relationship of the 1924 and 1938 act outside of the direct repeal context. The opinion was followed in 1979 in an opinion addressing the same question involving Executive Order reservations. 86 Interior Dec. 181 (1979) (Pet. App. 316). Thus the only administrative opinions directly on point support the Tribe.

Montana and *amici* States argue that the validity of the taxes was recognized by the Department of the Interior until 1977, but their argument is not supported by administrative interpretation or practice or by anything in the record in this case. First, any administrative decisions or practices prior to 1938 are irrelevant. Obviously, the issue before this Court did not arise until the passage of the 1938 Mineral Leasing Act.[22]

Second, no opinion prior to 1977 considered the question presented to this Court, and no opinion before 1956

[22]British-American Oil Producing Co. v. Board of Equalization, *supra*, was decided in 1936, and the leases at issue specifically recited the 1891 act as the authority under which they were executed.

even mentioned the 1938 act. A 1943 opinion, 58 Interior Dec. 535 (1943) (Pet. App. 232), construed the scope of the 1924 act tax consent in the context of Blackfeet and Ute Mountain (New Mexico) leases executed under the 1891/1924 act. The opinion specifically relied on *British-American*, *supra*, for its conclusion that the leases were subject to state taxation. The opinion made no reference whatsoever to the 1938 act or to leases made under it.

An unpublished Solicitor's Opinion in 1954, Op. Sol. Int., Oct. 29, 1954 (M-36246) (Pet. App. 248), addressed the method of payment of taxes on Blackfeet leases made under the 1891/1924 act. The opinion assumed that the taxes were authorized based on *British-American* and the 1943 opinion. No independent analysis of the validity of the taxes was made. The opinion concluded that the 1924 act did not require the Secretary to pay the taxes directly, and that he could authorize the producers to pay the taxes and deduct them from tribal royalty payments. Again, the 1938 act was not even mentioned.

Another unpublished opinion in 1955, Op. Assoc. Sol., Oct. 13, 1955 (M-36310) (Pet. App. 258), concluded that tribal royalties from 1891 act oil and gas leases on the Fort Peck Reservation were taxable by the State. The opinion also relied on the 1943 opinion and *British-American* and did not mention the 1938 act.

The first opinions to consider the relationship between the 1924 act and the 1938 act came in 1956 and 1966. The 1956 opinion, Op. Assoc. Sol., May 4, 1956 (M-36345) (Pet. App. 262), addressed the issue of outright repeal of the 1924 act by section 7 of the 1938 act and concluded that the 1938 act did not remove the tax consent in

the 1924 act. The 1966 opinion, Letter to Sonosky dated Oct. 27, 1966, reprinted at 84 Interior Dec. 905, 914 (1977) (Pet. App. 301), merely cited the 1956 opinion on the repeal issue. Also, it focused almost exclusively on whether the 1924 act applied to the Fort Peck Reservation, that is, whether the reservation land had been "bought and paid for" within the meaning of the 1891 act, and whether the Montana Enabling Act and Constitution prohibited the taxes. Thus neither opinion is directly on point.

In addition, the opinions were rendered eighteen and twenty-eight years after the 1938 act and thus not contemporaneous with its passage. Neither opinion was approved or sanctioned by the Solicitor for the Department of the Interior, nor were they formally published. For these reasons, the opinions are entitled to little, if any, weight.[23] *See General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 758 n.6 (1975).

Montana and *amici* States claim longstanding administrative recognition of the validity of state taxation of tribal royalties, but their claim simply is not borne out by a careful analysis of the administrative opinions or of any other evidence of record. No opinion focused on the relevant issue here. At most, the Department of the Interior recognized the validity of taxation of 1938 act leases only for the period between 1955 and 1977. Even then the issue was considered only in the context of direct repeal

[23]The 1956 and 1966 informal opinions were both made at a time when the official policy of the United States was to terminate all federal supervision over Indian tribes. *See* H. Con. Res. 108, 83d Cong., 2d Sess. (1954). It is not unlikely that the lower level Interior officials who made these opinions were influenced by this policy. Since the 1938 act was passed at another time and under a different policy, the termination policy ought to play no part in its interpretation.

of the 1924 act tax consent by the 1938 act and not in the terms argued here.

Montana argues that administrative practice shows that the Department of the Interior recognized the validity of the state taxes. However, state taxes have never been regularly and systematically paid to the State. As a result, the Department of the Interior has had little occasion to focus on the issue.

To begin with, 1938 act mineral leases did not begin producing immediately so as to make taxation an issue. Second, passage of the 1938 act did not itself trigger the question because at the time the Department of the Interior was not directly paying the taxes, nor has it directly paid any taxes since that time. The 1934 Indian Reorganization Act authorized tribal royalty payments to be paid directly to the tribes. Blackfeet leases therefore began requiring that royalty payments be made to the Tribe. *See* Op. Sol. Int., Oct. 29, 1954, *supra*, Pet. App. at 254. Under this arrangement the State apparently expected the Tribe to pay the taxes, but few, if any taxes were paid. *Id.* Montana therefore began billing the producer/lessees who in turn began putting pressure on Interior to authorize the producer/lessees to pay the taxes and to deduct the share attributable to the royalty from the royalty payments. *Id.* This method of payment was approved in 1954, and some taxes have been paid by producer/lessees since 1955.

Third, although payment of the taxes after 1955 was recorded in the records of the U.S. Geological Survey, those records show that no effort was made by Interior to enforce payment of the taxes. R. vol. II doc. no. 52 (exh. C). Payment was at most a hit or miss operation

with some companies paying taxes for some leases but not others, and some companies not paying at all.

Fourth, very few states were imposing taxes on tribal royalty interests. Only Montana and New Mexico were assessing taxes on these interests, and since 1977, Montana has been the sole state taxing tribal royalty interests. *See* Brief of *Amici* States at 23.[24] Thus, there was little pressure to consider the issue carefully.

These factors show that the Department of the Interior simply failed to deal directly with the issue of taxation of tribal royalties from leases executed under the 1938 act until 1977. Montana's and *amici* State's claim that Interior cooperated in and facilitated the payment of taxes does not stand up to scrutiny.[25] The only time Interior has directly confronted the issue raised in this case, it concluded that Montana taxes on tribal royalties were invalid.

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[24]*Amici* States say that Arizona also taxes Indian royalties, citing Industrial Uranium Co. v. State Tax Comm'n, 95 Ariz. 130, 387 P.2d 1013 (1963). This is not correct. The court expressly found that the legal incidence of the 1% business privilege tax there at issue was on the seller, not on tribal royalties. 387 P.2d at 1014.

[25]Even after Interior's 1977 opinion concluded Montana could not tax tribal royalties from leases made under the 1938 act, Montana continued to attempt to tax the royalties without any apparent protest from the Department of the Interior. Therefore, if anything is to be gleaned from the practice of Interior regarding payment of taxes, it is that Interior is guilty of total inaction—it acted neither to enforce payment nor to stop payments of the taxes.

E. Tribal Lands of a Self-Governing Indian Tribe Cannot Be Taxed by a State Based on Inferences from Ambiguous Laws.

The norm in Indian country is exemption of Indians and their property from state taxation. *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164 (1973). In 1924 tax consent is an explicit departure from that norm, enacted at a time when Congress thought the reservations were going to wither away under the allotment policy. *See Mattz v. Arnett,* 412 U.S. 481, 496 (1973). The 1938 act, however, is silent on the subject of taxation. It was passed at a time when the policy of Congress favored tribal self-government, a policy that was carried out by the IRA, which expressly made new tribal trust lands under it tax exempt. 25 U.S.C. 465. Montana's attempt to apply the 1924 tax proviso to 1938 act leases at best rests on an ambiguous and uncertain reading of the 1938 act. But the Court has repeatedly said that laws authorizing state taxation of reservation Indians must be express, and ambiguous words will be construed against the State. *E.g., Bryan v. Itasca County,* 426 U.S. 373, 392-93 (1976). While the 1924 proviso by its terms does not apply to the 1938 act, this rule of construction is an added barrier that the State's argument has not overcome.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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